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No. 07-926

In the Supreme Court of the United States

AUGUSTA N. ROMAN, PETITIONER,

VS.

RANDY M. ROMAN, *ET AL.*, RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

REPLY BRIEF TO BRIEF IN OPPOSITION TO GRANTING THE WRIT OF CERTIORARI

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INTRODUCTION

The *Brief of Randy M. Roman in Opposition* raises seven objections to Augusta Roman's *Petition for Writ of Certiorari*: 1) there is no state action involved in this case (opp. at 6); 2) there are no important questions of federal law involved in this case (*id.* at 12 and 13); 3) the speculative nature of Augusta's attempt to successfully give birth to a child through the implantation of these embryos weighs against granting the writ of certiorari (*id.* at i, 5, 8 n.3, and 14); 4) Randy has a superior constitutional right to avoid psychological parentage resulting from the birth of a child due to the implantation of genetically-related embryos (*id.* at i, 9-11, and 17); 5) the unanimous results in all appellate cases considering disputes between intended parents over the implantation or destruction of embryos evidences the absence of any important question of law (*id.* at i, 6, 13, and 15-16); 6) Augusta has contractually waived any constitutional rights she may have to implantation of the embryos (*id.* at i, 6, and 18); and 7) a ruling by this Court in favor of Augusta on the merits would have devastating effect on the IVF industry (*id.* at i and18-19).

None of these objections are persuasive; many are unsupported by citation to legal authority; and at least two are in direct conflict with each other.

I. ORDERS DIRECTING THE DISPOSITION OF MARITAL PROPERTY AND DETERMINING PARENTAL RIGHTS CONSTITUTE STATE ACTION.

The legal issues in this case arise from a divorce proceeding,[1] in which the Texas courts were asked to determine the parties' rights to possession and implantation of genetically-related embryos. *Roman v. Roman*, 193 S.W.3d 40, 41-42 (Tex. Civ. App. 2006) (pet. app. at 1-2). After balancing the constitutional rights of the parties, the trial court awarded the embryos to Augusta as part of a just and right division of the community estate. *Roman v. Roman*, No. 2002-63153, Findings of Facts and Conclusions of Law (Dist. Ct., 310 Judicial Dist., Harris Cty., Tex.), pet. app. 39. The Court of Appeals for the First District of Texas declined to address

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[1] While it is true that this Court has historically been reluctant to become embroiled in domestic relations matters, it is clear that this reluctance is largely a matter of interpreting the statue conferring diversity jurisdiction upon federal courts, and not a matter of constitutional limitations on the Court's jurisdiction. *Marshall v. Marshall*, 547 U.S. 293, 298 (2006) and *Ankenbrandt v. Richards*, 504 U.S. 689, 697 (1992).

Petitioner seeks a determination of whether her constitutional rights to bear a child and to establish and continue the familial relationship includes the right to be free of government-ordered discarding of genetically-related embryos. As such, granting certiorari in this case is necessary to answer a substantial federal question that transcends or exists apart from the family law issue, *see, e.g., Palmore v. Sidoti*, 466 U.S. 426, 432-34 (1984). *Cf. Marshall v. Marshall*, 547 U.S. 293, 305-13 (2006) (previous decisions only support narrow application of domestic relations and probate exceptions to jurisdiction of federal courts).

any constitutional issues, yet reversed and directed the trial court to issue an order that the frozen embryos be discarded in accordance with an agreement between the Romans and The Center for Reproductive Medicine ("the Center"). *Roman*, 193 S.W.3d at 55 (pet. app. 34-35).

If the Center is ordered to discard the embryos, Augusta will be permanently deprived of her ability to bear the biologically-related children whose birth may result from implantation of the embryos, and her right to establish or continue the familial relation with such children.

A. State Action in this Case is Similar to Involuntary Sterilization.

The issues in this case are most analogous to issues arising in cases involving government orders of sterilization or termination of parental rights in that judicially-order discarding of the embryos permanently deprives Augusta from having biologically related children and from continuing her biological relationship with the children who may be born as a result of allowing her to implant the embryos.

Respondent Randy Roman does not, and could not make any credible claim that orders of sterilization do not constitute state action. *Cf. Buck v. Bell*, 274 U.S. 200 (1927) and *Skinner v. State of Okl. ex rel. Williamson*, 316 U.S. 535 (1942). Instead he intermittently concedes and disputes that Augusta's chance of bearing a biologically-related

child, absent use of the embryos, is less than one percent at her present age. Opp. 8-9, 12 and 14. Augusta concedes that the record is silent on her *present* ability to conceive a biologically-related child, but the absence of such evidence is a necessary, if unfortunate, consequence of appellate review. If such evidence is critical to the application of the controlling constitutional norms in this case, it would be proper to remand the case for a determination of Augusta's present ability to conceive a biologically-related child *after* settling the constitutional norms that control the disposition of the embryos. The absence of such evidence at this time, however, should not bar this Court from granting her petition for certiorari. *Cf. Federal Election Com'n v. Wisconsin Right to Life, Inc.*, 127 S.Ct. 2652, 2662 (2007) (describing the exception to the mootness doctrine for disputes capable of repetition, yet evading review).

B. State Action in this Case is Similar to the Termination of Parental Rights.

State action is also clearly present since Augusta's ability to establish and continue a familial relationship with the biologically-related children that may be born due to implantation of the embryos is finally and irrevocably terminated by the judicially-ordered discarding of the embryos. Judicial orders terminating familial relationships are indisputably state action. *M.L.B. v. S.L.J.*, 519 U.S. 102, 117 n.8 (1996) ("Although the termination proceeding in this case was initiated by private parties as a prelude to an adoption petition, rather

than by a state agency, the challenged state action remains essentially the same: M. L. B. resists the imposition of an official decree extinguishing, as no power other than the State can, her parent-child relationships."). *See also Rivera v. Minnich*, 483 U.S. 574, 579-82 (1987) (contrasting gravity of state action involved in paternity and termination proceeding); and *Santosky v. Kramer*, 455 U.S. 745, 759 (1982) ("[f]ew forms of state action are both so severe and so irreversible [as the termination of parental rights].").

Respondent, Randy Roman, has provided no legal argument supporting his assertion that "whatever constitutional right Augusta may have should not matter because there is no state action involved to implicate the Bill of Rights." Opp. at 6. This statement can only be accepted if the involvement of the state courts in this case is completely disregarded. Absent such disregard, the existence of state action is clear.

II. THE EXISTENCE OF FEDERAL CONSTITUTIONAL QUESTIONS IS ESTABLISHED BY THE RECORD AND RANDY'S CONTINUED RELIANCE ON COMPETING CONSTITUTIONAL CLAIMS.

Randy attempts to dissuade this Court from granting the writ of certiorari by arguing "[i]f there is a constitutional right at issue in this case, it is the right to decide whether or *not* to beget a child, a right Randy Roman has as well." Opp. at 12 (emphasis in original). This statement refutes his claim only two paragraphs later that "[t]his dispute

simply does not involve any federal question, much less an important federal question." Opp. at 13.

Both Augusta and Randy have argued that their constitutional rights are at stake throughout this litigation. This is evidenced by the trial court's statement that it arrived at its decision only after "balancing the constitutional rights of both parties," *Roman v. Roman*, No. 2002-63153, Findings of Facts and Conclusions of Law (Dist. Ct., 310 Judicial Dist., Harris Cty., Tex.), pet. app. 39, and the appellate court's description of Randy's constitutional claims. *Roman*, 193 S.W.3d at 42.

There is no legitimate question of whether important questions of federal law exist in this case.

A. This Case Presents the Important Question of Whether Constitutional Protections from Unwarranted Governmental Intrusion in the Decision to Bear or Beget a Child Apply in an Intervening Period between Conception and Pregnancy.

The Constitution protects the right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision as to whether to bear or beget a child." *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). In *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) this Court recognized that this right encompassed the right to continue a pregnancy free of unwarranted government interference. Both of

these decisions assumed a continuous process of sexual intercourse, conception and pregnancy. The advent of *in vitro* fertilization segments this process, eliminating sexual intercourse as the initiating event, and separating conception from pregnancy.

In the present case conception has occurred, but pregnancy has not begun. The narrow question presented by this case is whether the constitutional protections from unwarranted governmental intrusion in the decision to conceive a child and the decision to carry a pregnancy to term apply when there is an intervening period between conception and pregnancy.

The need for resolution of this issue was noted by the President's Council on Bioethics in their report, REPRODUCTION AND RESPONSIBILITY: THE REGULATION OF THE NEW BIOTECHNOLOGIES (2004).

> The most common litigation out of the context of assisted reproduction relates to the custody or disposition of untransferred embryos and rights and obligations of those standing in direct relationship to them. Courts are currently struggling with how to handle such cases, and they draw upon concepts from family law, constitutional law, and contracts or informed consent law to resolve the disputes.

Id. at 69.

B. This Case Presents the Important Question of Whether Constitutional Protections of Familial Relations Apply at Conception.

American jurisprudence leaves no doubt that the freedom to enter into, maintain, and cultivate familial relations is constitutionally protected. *E.g.*, *Troxell v. Granville*, 530 U.S. 57 (2000) (parents' authority over the upbringing of their children is "perhaps the oldest of the fundamental liberty interests recognized by this Court").

The law is equally clear that familial relationships arise at the moment of conception. Inheritance rights of children who are *en ventre sa mere* are commonly preserved until their birth. UNIFORM PROB. CODE § 2-108 (1990) and RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 2.1(d) (1999). In many states parents may recover for negligence resulting in the death of their unborn children. *See* Sheldon R. Shapiro, *Right to maintain action or to recover damages for death of unborn child*, 84 A.L.R.3d 411 (2007). Fathers may be required to contribute to the costs of pregnancy and childbirth, even in cases where the child is stillborn. *See e.g.*, *State ex rel. Discus v. Van Dorn*, 10 N.E.2d 14 (Ohio Dist. Ct. 1937); and *C. v. L.*, 305 N.Y.S.2d 69, 71, 61 Misc.2d 381, 382 (N.Y.Fam.Ct. 1969). *Cf. Boyd v. District of Columbia*, 526 F.Supp.2d 44, 49-50 (D.D.C. 2007) (putative fathers' rights to continue familial relations were violated by government

coercion which resulted in their partners obtaining abortions).

Randy's claim that this case involves no important federal question is not supported by argument in his response or the record of his past arguments of the case. Review by this Court is necessary to settle the important question of whether the constitutional protections of the decisions to beget a child and to establish or continue familial relationships extend to decisions of the genetic and intended parents seeking to implant their embryos.

III. The Medical Probability of Augusta Successfully Giving Birth to a Biologically-Related Child By Implantation of These Embryos is Irrelevant to the Decision to Grant Certiorari.

Randy opposes the granting of certiorari because of the small probability that Augusta will successful bear a biologically-related child through the implantation of these embryos, opp. 8 n.6, 12 and 14., yet he fails to explain how this is legally relevant to the question of whether this case presents important questions of federal law that should be settled by this Court. Augusta's claim is *not* that she has a constitutional right to successfully bear biologically-related children. Her claim is that she has a constitutional right to implant the genetically-related embryos in order to bear biologically-related children.

IV. Randy's Claim of a Superior Constitutional Right to Avoid Psychological Parentage Establishes the Need for this Court to Grant the Writ of Certiorari.

By asserting that the Constitution protects a right to avoid psychological parentage, opp. at 10-11 and 17-18, after voluntarily and intentionally participating in the conception of the embryos, Randy has conceded that this case requires constitutional interpretation by this Court. Augusta explicitly asked this Court to decide the merits of Randy's claims in Propositions II and III of her Petition for Writ of Certiorari.

V. Courts Have Divided Sharply Over the Enforceability of Contractual Waivers in Disputes Regarding the Disposition of Human Embryos.

Randy argues that Augusta's petition for certiorari should be declined because "[a]ll prior appellate decisions concerning custody of frozen pre-embryos agree" with his position. Opp. at 15-16. It is true that all appellate opinions addressing disputes between related parties over the disposition of embryos have denied implantation. This uniformity of outcome, however, masks importance analytical differences between the opinions.

The first American court to address competing claims over the disposition of embryos held that "[i]t serves the best interests of the child or children, in vitro, for their Mother, Mrs. Davis, to be permitted

the opportunity to bring them to term through implantation." *Davis v. Davis*, No. E-14496 (Tenn. Cir. Ct. Sept. 21, 1989) (Westlaw at 1989 WL 140495) at *1. The Tennessee Supreme Court ultimately reversed on the basis that the embryos were neither children nor property. *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992), cert. denied sub nom. *Stowe v. Davis*, 507 U.S. 911 (1993). The court recognized the constitutional dimensions of the right to procreate and the right to avoid procreation. *Id.* at 598-603. Since the constitutional rights asserted by the parties were in conflict, the court weighed the relative burdens that would be imposed by discarding the embryos, as advocated by the husband, and donating the embryos to unrelated parties for gestation, as desired by the wife. *Id.* at 604. The court held that the husband had the greater interest, but noted that the outcome might differ in a case, such as the one at bar, in which the party seeking to implant the embryos had no other reasonable possibility of "achieving [biological] parenthood by means other than use of the preembryos in question." *Id.* at 605.

In *J.B. v. M.B.*, 783 A.2d 707 (N.J. 2001), the court declined to rely upon an informed consent agreement between the couple and the IVF clinic, similar to the one in this case, instead embracing the constitutional reasoning of the *Davis* court and ordering the embryos be destroyed. *Id.* at 715-18.

In contrast, the New York Court of Appeals in *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998) concluded that no constitutional rights were implicated. *Id.* at

564. Therefore the parties' agreement to donate embryos to an *in vitro* fertilization program for research purposes would control. *Id.* at 181-82.

The court's conclusion in *Litowitz v. Litowitz*, 48 P.3d 261, 262 (Wash. 2002), cert. denied 537 U.S. 1191 (2003) that no constitutional rights of wife were at stake is dependent upon the fact that the couple had used donor eggs in the creation of the embryos. The court ruled that because wife was not genetically related to embryos, "[a]ny right she may have to the preembryos must be based solely upon contract." *Id.* at 267. The outcome of this case has little relevance to Augusta's petition for certiorari since she contributed the eggs used in the conception of the embryos at issue.

The remaining appellate opinions relied upon in Randy's brief opposing certiorari do not rely upon the constitutional rights of the parties, instead deciding the cases based upon contractual analysis and interpretations of public policy. In *A.Z. v. B.Z.*, 725 N.E. 2d 1051 (Mass. 2000) the court declined to enforce the couple's agreement that the embryos would be given to the wife for implantation if the couple divorced, in part on the basis that enforcement would violate the public policy of the state. *Id.* at 1057-58. The Iowa Supreme Court adopted similar reasoning in *In re Marriage of Witten*, 672 N.W.2d 768, 789-93 (Iowa 2003).

The diversity of reasoning and constitutional analysis employed by these opinions evidence the

need for this Court to settle the important federal questions presented by this case.

VI. A RULING ON THE MERITS OF THIS CASE WOULD PROVIDE NEEDED GUIDANCE IVF PROVIDERS.

Randy's final objection to the issuance of a writ of certiorari is based upon speculation regarding the effect of a ruling in favor of Augusta on the merits of this case. It evaluating this objection, it is important to note the participation of Respondents, The Center for Reproductive Medicine and Vicki Schnell, M.D., in this litigation. These Respondents are the proper parties to raise any prudential concerns regarding the effect of a ruling in this case on IVF providers, yet they waived any objections to the petition. This waiver suggests that the Center and Dr. Schnell do not share Randy's concerns regarding the impact of a ruling on the merits. Such a ruling could provide much-needed certainly to IVF providers regarding the proper disposition of embryos in disputes between parties who are related to the embryos. *See* President's Council on Bioethics, REPRODUCTION AND RESPONSIBILITY (2004) at 9 and 69.

CONCLUSION

Respondent Randy Roman has failed to establish any argument against the granting of certiorari in this case. Notwithstanding its caption, the *Brief for Randy M. Roman in Opposition* contains significant support for Petitioner's assertion

that this case presents important questions of federal law that should be settled by this Court. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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